IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 27TH JUNE 2007 / 6TH ASHADHA 1929

SA.No. 65 of 1994()

AS.89/1987 of SUB COURT, TIRUR
OS.47/1984 of MUNSIFF COURT, PARAPPANANGADI
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APPELLANT: RESPONDENT:PLAINTIFF:

V.M.AMINAKUTTY,
D/O.VALIAPARAMBIL MUHAMMED,
MOONNIYOOR AMSOM AND DESOM,
TIRUR TALUK.

BY ADV. SRI.N.P.SAMUEL

RESPONDENTS:APPELLANTS:DEFENDANTS:
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1. MAANNANCHERY KRISHNAN,
S/O.VELAYUDHAN ALIAS APPU,
VELIMUKKU AMSOM AND DESOM,
TIRUR TALUK, MALAPPURAM DISTRICT.

***2. KALANGADAN MOIDEEN,**
S/O.ALAVI, MOONNIYOOR DESOM & AMSOM,
TIRUR TALUK, MALAPPURAM. (D E L E T E D).

***THE NAME OF THE 2ND RESPONDENT IS DELETED FROM THE PARTY ARRAY AT THE RISK OF THE APPELLANT AS PER ORDER DTD. 14/06/2004 IN I.A.1022/04**

3. PATHIYIL NAGAAN ALIAS NARAYANAN,
S/O.CHATHANKUTTY, MOONNIYOOR AMSOM,
DESOM, TIRUR TALUK, MALAPPURAM DISTRICT.

BY ADV. SRI.M.K.DAMODARAN (SR.) for R3

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 27/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

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S.A.No. 65 OF 1994

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DATED THIS THE 27th DAY OF JUNE, 2007

JUDGMENT

Plaintiff in O.S.47 of 1984 on the file of Munsiff Court, Parappanangadi is the appellant. Defendants are respondents. Appellant instituted the suit seeking a decree for declaration of right of way by easement of prescription over plaint A schedule way. Plaint B schedule property originally belonged to PW2 Mohamed Haji under Ext.A1 sale deed dated 2.5.1961. Appellant, along with Chekutty purchased the same. Under Ext.A2 Chekutty released his rights in favour of appellant and appellant is the owner of plaint B schedule property. She is residing therein. According to appellant, plaint A schedule property is the way to plaint B schedule property and her predecessors and the appellant have been using that way openly, peaceably and without obstruction for more than 45 years and therefore she has prescribed a right of way by easement of prescription and respondents caused obstruction to the way by constructing a structure and they have no right to do so. The suit was instituted seeking a decree for declaration of right of way and consequential injunction. Respondents in their

written statement denied the existence of the way. According to respondents plaint A schedule way is not in existence and appellant is not entitled to a right of easement by prescription and they purchased the property including plaint A schedule property for constructing an office to their political party and because of political reasons the suit was filed. Appellant originally contended that plaint A schedule way is a purampoke. It was subsequently got amended substituting a case that it is a vacant land. Respondents filed additional written statement contending that appellant did not plead who is the owner of plaint A schedule property and without disclosing the ownership of plaint A schedule property appellant is not entitled to the decree sought for. Before the trial court, apart from the appellant as PW1 her assignor was examined as PW2. Apart from first respondent as DW1, DW2 was also examined. Ext.A1 to A4, Ext. B1 to B3 and Ext.C1 to C4 were marked. Learned Munsiff on the evidence though found that the way to plaint B schedule property is through plaint A schedule property, held that the way is not having 10 feet width as claimed in the plaint. But accepting the evidence of appellant a decree for declaration of right of easement and an injunction was granted. Defendants

challenged the decree and judgment before Sub Court, Tirur in A.S.89 of 1987. First appellate court appreciating the evidence found that trial court itself found that plaint A schedule property is not having a width of 10 feet. Appellate court also found that evidence of PW2 should not have been relied on by the trial court and evidence of PW1, is insufficient to establish a right of way by easement of prescription. Therefore appeal was allowed and decree granted in favour of appellant was set aside. It is challenged in the second appeal.

2. The second appeal was admitted formulating the following substantial questions of law:-

i)When the servient owner denies having given permission to the dominant owner to use the servient tenament for ingress and egress and when it is proved that the dominent owner uses the servient tenament as a way, is not a presumption arises that the user is as of right? Has not the appellant proved the ingredients of easement by prescription ?

ii) In view of Ext.C1 and C2 and the evidence of PW1 and 2 was the lower appellate court justified in denying the right of easement by prescription to the plaintiff?

3. Learned counsel appearing for the appellant and respondents were heard.

4. Plaint B schedule property lies to the north of Muttichira Kaliyattumukku panchayat road. Plaint A schedule property is described in the plaint as a way leading to plaint B schedule property from the southern panchayat road having a width of 1.2/3 six feet Koles and a length of three and a half six feet koles. As rightly pointed out by learned counsel appearing for respondents, there is no pleading as to the ownership of the plaint A schedule property. The original pleading was that it is a purampoke land. But after written statement was filed, plaint was got amended and it was pleaded that plaint A schedule property is a vacant land. Even then appellant did not plead who the owner is. From the description of the plaint A schedule property it is not possible to fix the way. As per Ext.C3 plan the property which lies to the east and west of plaint A schedule property as demarcated therein is the vacant land, which lies to the north of the panchayat road. What was described in the plaint is that the eastern and western boundary are remaining property of the appellant. The property of the appellant is further to the north of the vacant land and not on its east or

west. If so, the eastern and western boundary of the disputed way cannot be the remaining property belonging to the appellant as described in the plaint. When the appellant is seeking a decree for declaration of right of easement by prescription, it is incumbent on the appellant to plead who is actually the owner of the servient tenament over which a right of way by easement by prescription is claimed. The plaint is silent on that aspect.

5. Learned counsel appearing for respondent argued that in the written statement defendants have admitted that including plaint A schedule plroperty, the property which lies to the north of the road was purchased by them and therefore respondents are the owners of the servient tenament and so there is no defect in the pleading. Learned counsel appearing for respondents relied on the decision of the single Judge of this court in **Mathai** V. **Kuttan Gopalan** (2001(1) KLT Short notes 17 Case No.20) where an identical question was considered and argued that without pleading the ownership of the servient tenament appellant is not entitled to a decree for declaration of right of way. As in this case the ownership of the servient tenament was not pleaded in that suit, where a decree for declaration of right of easement by necessity was claimed. A

similar contention was raised in the said suit also that defendant admitted that he is the owner of the property and therefore there was no defect. Relying on the decision of the Apex Court in **Firm Srinivas Ram** V. **Mahabir Prasad & others**(AIR 1951 SC 177)it was contended that court can look into the evidence and admitted facts and mould the relief. This court did not agree with the argument and held that when a right of easement is claimed it is mandatory that plaintiff should plead regarding the ownerhsip of dominant as well as servient tenament as also the nature of the easement right claimed in its specific form. When appellant is seeking a decree for declaration of right of easement, she should have pleaded as to whom plaint A schedule property belongs. Without the owner in the party array and specific pleading with regard to the ownership of the servient tenament, appellant is not entitled to get the decree for declaration of right of way.

6. When a right of easement by prescription is claimed, it is for the appellant to plead and prove all the ingredients constituting the right of easement by prescription. Learned counsel pointed out that there is no pleading that appellant or her predecessors have been using the disputed way as of right

and as an easement. Learned counsel appearing for appellant argued that in another paragraph of the plaint it was pleaded that appellant has been using the way and has easement right and therefore it is to be taken that there is proper pleading that appellant and her predecessors have been using the way as of right and as an easement. True, there is a pleading that appellant and her predecessors have been using the plaint A schedule way for more than 45 years without anybody's consent and obstruction openly and peaceably. But that is insufficient. There should be specific pleading that the said usage was as of right and as an easement. A recital in another paragraph that the appellant has prescribed a right of easement will not suffice.

7. Even if it is taken that there is sufficient pleading the question is whether there was evidence. Trial court on the evidence found that appellant did not establish a right of way over plaint A schedule property as there is no evidence to prove that the appellant or her predecessor have been using a way having a width of 10 feet. Still a decree as sought for was granted. First appellate court reappreciated the evidence and entered a factual finding that there is no evidence to prove that appellant has been using the way having a width of 10 feet.

Thoug PW2 the assignor of the appellant was examined, first appellate court on appreciation of evidence, found his evidence unreliable. First appellate court also found that interested version of PW1 alone is insufficient to prove a right of way as claimed by the appellant. That factual finding cannot be interfered by reappreciating the evidence in exercise of the limited powers of this court under Section 100 of Code of Civil Procedure. The fact that appellant or her predecessors have been using the vacant land which lies to the south of her property by itself will not enable the appellant to get a decree for declaration of right of easement by prescription without establishing the ingredients. I find no reason to interfere with the finding. Appeal is dismissed.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-

M.SASIDHARAN NAMBIAR, J

S.A.42 OF 1994

JUDGMENT

27.6.2007